

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

FERNANDO R. JIMENEZ,

Petitioner,

vs.

GLEN WHORTON, *et al.*,

Respondents.

3:08-cv-00047-LRH-RAM

ORDER

This habeas action under 28 U.S.C. § 2254 comes before the Court on petitioner's motion (#25) to dismiss Ground 6, motion (#26) for the Court to order an answer on the merits on Grounds 1 through 5, and motion (#27) for a copy of an order of the Court of Appeals filed at #11.

The motion to dismiss the unexhausted Ground 6 will be granted.

Petitioner's motion for an order directing respondents to file an answer on the merits, as opposed to any other response, will be denied. Case authorities stating generally that a petitioner may "proceed" with exhausted claims after dismissing unexhausted claims in a mixed petition do not in any sense signify that the petitioner may proceed forward on the exhausted claims without those claims being subject to other defenses applicable to the exhausted claims. Such authorities signify only that petitioner must be given the option to dismiss any unexhausted claims as an alternative to immediate dismissal of the entire petition for lack of complete exhaustion, which has been done in this case. This Court already has held that all defenses presented by respondents in the prior motion to dismiss may be pursued in a renewed motion. #24, at 5 n.3. That holding remains in full force and effect, and the case authority relied upon by petitioner in the motion is not in any sense to the contrary.

0 IT FURTHER IS ORDERED that petitioner's motion (#26) for the Court to order an answer on
1 the merits on Grounds 1 through 5 is DENIED.

IT FURTHER IS ORDERED that, within thirty (30) days of entry of this order, respondents shall file a motion to dismiss as per #12, which may include a renewal of the defenses presented in their earlier motion to dismiss. The response shall include only procedural defenses, and respondents shall not combine in this case a motion to dismiss presenting procedural defenses with an answer on the merits.

22 DATED this 4th day of September, 2009.

-2-